

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

**CASE NO. 09-2051-MD-ALTONAGA**

In re

**DENTURE CREAM PRODUCTS  
LIABILITY LITIGATION.**

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This Document Relates to All Actions

**CASE MANAGEMENT ORDER NO. 5**  
**PROCEDURES AND SCHEDULING OF FACT WITNESS DEPOSITIONS (“CMO 5”)**

Having considered the Motion for entry of CMO 5, it is

**ORDERED AND ADJUDGED** that:

**I. PURPOSE AND APPLICATION OF CMO 5**

The purpose of this Order is to set forth procedures and scheduling for the taking of fact witness depositions in the Denture Cream Products Liability Litigation. This Order applies to all cases docketed in MDL-2051 at the time this Order is entered and to related cases later filed in, removed, or transferred to this Court. The “GSK Defendants” referenced in this Order include SmithKline Beecham Corporation d/b/a GlaxoSmithKline, GlaxoSmithKline Consumer Health Care L.L.C., GlaxoSmithKline Consumer Healthcare, L.P. and Block Drug Company, Inc. The “P&G Defendants” referenced in this Order include The Procter & Gamble Manufacturing Company and The Procter & Gamble Distributing LLC. This discovery order does not address or apply to depositions of parties’ experts.

**II. GENERAL INFORMATION**

A. **Applicable Rules.** All fact depositions shall be conducted pursuant to the applicable Federal

CASE NO. 09-2051-MD-ALTONAGA

Rules of Civil Procedure and Local Rules of this Court, and as further specified herein.

**B. Coordination with Other Actions.** In order to avoid duplicative discovery, minimize the number of times that a witness shall appear for a deposition, and to prevent the unnecessary expenditure of judicial resources and the resources of parties, counsel for plaintiffs in the MDL shall use their best efforts to coordinate the scheduling of depositions with counsel for state court plaintiffs. In a coordinated deposition first noticed in MDL-2051, the Court expects counsel for plaintiffs in the MDL and counsel for state court plaintiffs to cooperate in selecting the primary examiners described in section IV, below. Upon the conclusion of the examination by the primary examiners, counsel for plaintiffs in a state court proceeding may ask additional questions prior to the completion of the deposition, subject to overall time limitations to be agreed among the parties. Regardless of which counsel conducts the initial examination of the deponent, subsequent questioning shall not be redundant or repetitive, although clarification of prior testimony may be sought if reasonably calculated to elicit testimony that adds to the substance of prior testimony.

### **III. DEPOSITION PROCEDURES**

#### **A. Scheduling.**

1) **Coordination.** Absent extraordinary circumstances, counsel should consult in advance with opposing counsel and counsel for proposed deponents in an effort to schedule depositions at mutually convenient times and locations. Counsel are expected to cooperate and coordinate the scheduling of all depositions.

2) **Timing.** The parties shall confer regarding the timing of commencement of depositions, which will be included in a subsequent deposition protocol to be submitted prior to commencement of the first deposition. If a deposition occurs before document production is

CASE NO. 09-2051-MD-ALTONAGA

completed, and documents received after the deposition raise additional questions for the witness, the deposing party may reopen the deposition only with agreement of the parties or upon a showing of good cause. To the extent practicable, counsel shall consult with opposing counsel and, if ethically permitted, potential deponents in an effort to schedule depositions at mutually convenient times and locations. Counsel for deponents who are employees of defendants are expected to cooperate in the scheduling of depositions requested by plaintiffs. The Court will resolve any deposition scheduling issues that Lead Counsel or their designees are unable to resolve.

3) **Multi-Tracking.** Only one deposition of plaintiffs or current or former employees of the defendants shall be taken per day absent agreement of the parties or until such time as there is a demonstrated need to multi-track such depositions. The deposition of any specific plaintiff may proceed in the same week as the depositions of current or former employees of the defendants. Other fact witnesses may be multi-tracked, and the parties shall meet and confer on the establishment of a reasonable schedule for depositions. To the extent that the parties cannot agree on a proposed schedule for multi-tracked depositions, the parties shall file with the Court separate proposed schedules. After counsel, through consultation, have arrived on a mutually acceptable date and location for a deposition, each side shall be notified of the scheduled deposition at least thirty (30) days in advance. Depositions may not take place in more than three consecutive weeks out of every four consecutive weeks. The fourth week shall be an “off” week. In any given calendar week, the Plaintiffs in the MDL will ordinarily take the depositions of no more than two (2) current or former employees of each defendant group (i.e., the GSK Defendants and the P&G Defendants). The limitations set forth in this paragraph may be modified by agreement of the parties or Court order.

CASE NO. 09-2051-MD-ALTONAGA

**B. Deposition Notices.**

1) **Notice of Deposition.** Deposition Notices shall comply with Fed. R. Civ. P. 30 and shall include the date, time and place of the deposition, the name of the deponent and, if known, (a) the general occupational description of the deponent and (b) a general description of the topic(s) for examination. While the parties agree to provide a general description of the topics to be the subject of non-30(b)(6) depositions, such disclosure shall not serve to limit the scope of a non-30(b)(6) deposition if other relevant areas of inquiry are identified. In order for counsel to make arrangements for adequate deposition space, whenever feasible, counsel who intend to attend a deposition noticed in MDL 2051 should provide notice to the individual counsel signing the Notice of Deposition within 15 days of receipt. Deposition notices shall state whether the deposition is to be videotaped and, if so, the name, firm and address of the videotape recorders.

2) **Cross-Notices Between State Court Cases and These Proceedings.** In order to avoid duplicative discovery and to prevent the unnecessary expenditure of judicial resources and the resources of the parties, steps should be taken to encourage counsel in related state court proceedings to coordinate their fact depositions with MDL-2051 depositions. Plaintiffs' State Court Liaison Counsel shall copy all known Plaintiffs' counsel (by mail, courier, facsimile or electronic mail) on all deposition notices filed by Plaintiffs in MDL-2051. Defendants' Lead or Liaison Counsel shall provide the MDL Plaintiffs' Lead and Liaison Counsel, the Plaintiffs' State Court Liaison Counsel and Plaintiffs' known State counsel with at least ten (10) days' notice of any cross-notices by Defendants of a deposition originally noticed in a State court and cross noticed in this MDL proceeding or originally noticed in this MDL proceeding and cross-noticed in a state court proceeding. If counsel cannot agree on the order of questioning at a deposition, these rules shall

CASE NO. 09-2051-MD-ALTONAGA

apply: if the deposition was originally noticed in this MDL, whether or not later cross-noticed in state court proceedings, MDL counsel shall go first in the deposition. The parties shall confer regarding the division of examination time, which will be included in a subsequent deposition protocol to be submitted to the Court. Regardless of which counsel conducts the initial examination of the deponent, subsequent questioning shall not be redundant or repetitive, although clarification of prior testimony may be sought if reasonably calculated to elicit testimony that adds to the substance of prior testimony. Nothing in this provision shall be construed as an injunctive or equitable order affecting state court proceedings. Rather, this provision is intended to reflect the Court's desire for voluntary state-federal coordination.

C. **Number of Depositions.** The parties shall confer regarding reasonable limits on the total number of depositions to be taken of any party, fact witnesses, or other case-specific depositions. The Court will resolve any issues that Lead Counsel or their designees are unable to resolve.

D. **Length of Examinations in Fact Witness Depositions and Division of Examination Time Among Questioners.** A deposition day typically shall commence at 9:30 a.m. and terminate no later than 5:30 p.m. local time. The examination of any single witness shall be no more than two consecutive business days, absent agreement or further order of the Court upon a showing of good cause. Variations in this schedule may be made by agreement of counsel who noticed the deposition and counsel for the witness. Within these parameters, the parties shall confer regarding the total hours of actual examination time and the division of examination time among the party noticing the deposition, the party defending the deposition, MDL or State Court Plaintiffs' Counsel, and counsel for the GSK Defendants and the P&G Defendants. The parties shall incorporate their agreements into a further deposition protocol to be submitted to the Court. It is contemplated that all

CASE NO. 09-2051-MD-ALTONAGA

examinations will be conducted in a manner mindful of the requirements of Section II. B. above. The Court will resolve any issues that Lead Counsel or their designees are unable to resolve.

E. **Postponements.** Once a deposition has been scheduled, it shall not be taken off calendar, postponed, rescheduled, or relocated less than five (5) calendar days in advance of the date it is scheduled to occur, except upon agreement of counsel or by leave of Court for good cause shown. Given the large number of attorneys involved in this litigation, the unavailability of counsel who is not conducting or defending the deposition shall not be grounds for postponing a deposition.

F. **Attendance.**

1) **Who May be Present:** Unless otherwise agreed to by the parties or ordered under Fed. R. Civ. P. 26(c), depositions may be attended only by one representative of each party (other than counsel for the party), the deponent, the deponent's attorney (if not counsel for a defendant), attorneys of record in MDL-2051 or state Denture Cream Products Liability related cases, court reporters, videographers, and any person who is assisting in the litigation and whose presence is reasonably required by counsel conducting or defending the deposition. Upon application, and for good cause shown, the court may permit attendance by a person who does not fall within any of the categories set forth in the previous sentence. Attendees at any deposition shall execute an acknowledgment that they are bound by the provisions of Case Management Order No. 2. If during the course of any deposition, the examination involves information or documents which any defendant claims to be confidential pursuant to Case Management Order No. 2 entered in this litigation, persons to whom disclosure is not authorized under the confidentiality order shall be excluded from the deposition. Those portions of depositions deemed confidential pursuant to said Order will be treated and handled pursuant to the requirements of that Order.

CASE NO. 09-2051-MD-ALTONAGA

2) **Unnecessary Attendance:** Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the court. Counsel who have only marginal interest in a proposed deposition or who expect their interests to be adequately represented by other counsel should elect not to attend.

**G. Location of Depositions. Unless otherwise agreed, any deposition of:**

1) Plaintiffs, doctors, case specific fact witnesses and other non-party witnesses shall take place within the federal district in which that person resides or at a location mutually agreeable to the witness and the parties.

2) Current and former employees and officers of Defendants, who reside within the United States, will take place in the federal district of such employees' or officers' places of business. Defense counsel will make reasonable efforts to obtain the agreement of former employees of defendants to appear at the same location as current employees of the same defendant. Absent such agreement, that deposition will take place either within the federal district in which the former employee resides or at a location mutually agreeable to the former employee and the parties.

3) Plaintiffs may seek the depositions of Defendant current and former employees who work outside the United States. Plaintiffs may not take the deposition of any such individual until at least sixty (60) days after the deposition notice has been served on the deponent, absent agreement of the parties or upon order of the Court. Defense counsel will make reasonable efforts to obtain the agreement of former employees of defendants to appear at the same location as current employees of the same defendant. In order to reduce the cost and burden of conducting depositions of persons living abroad, depositions of such persons shall take place, to the extent possible, during a single consecutive period of time in London, England, at the offices of defense counsel; in the city

CASE NO. 09-2051-MD-ALTONAGA

where the witness resides; or any other mutually agreeable location.

#### **IV. CONDUCT OF DEPOSITIONS**

A. **Cooperation.** Counsel are expected to cooperate with, and be courteous to, each other and deponents during the course of any deposition. Counsel shall refrain from engaging in colloquy during depositions. There shall be no smoking or use of other tobacco products in any room in which a deposition is being conducted, including before, during or after a deposition, or in the deposition room during deposition recesses. Beverages will be permitted. Counsel shall recess from time to time during the deposition for meals and to permit periods of rest or refreshment reasonably required by the deponent, stenographer(s) and/or counsel conducting or defending the deposition.

B. **Continuance of Deposition.** If a deposition is not completed by 1:00 p.m. on a Friday, the deposition will recommence on the next business day, subject to the availability of the witness. The parties and witnesses may, however, mutually agree to proceed past 1:00 p.m. If the witness is not available for deposition on the next business day, the deposition will continue on a date to be agreed upon by counsel or, if agreement cannot be reached, a date specified in a notice of continued deposition. Where a notice of continued deposition is required, service of notice ten (10) or more days prior to the date specified for the continued deposition shall be deemed adequate notice.

C. **Examination.** Questioning should be by no more than two attorneys designated by Plaintiffs' Co-Lead Counsel and mindful of the requirements of Section II. B. above, and one attorney for each Defendant. If two attorneys are designated, the examinations conducted shall not be redundant or repetitive, although clarification of prior testimony may be sought if reasonably calculated to elicit testimony that adds to the substance of prior testimony. Only one attorney may represent the deponent at any given time.



CASE NO. 09-2051-MD-ALTONAGA

D. **Objections and Directions Not to Answer.** Unless otherwise agreed by the parties, and noted on the record, the following stipulations shall apply to all depositions in this action:

1) **One Objection For All Defendants.** Unless otherwise specified by any defendant, an objection by a single defendant shall be deemed an objection by all defendants. However, unless otherwise specified, an instruction not to answer by one defendant should not be deemed an instruction not to answer by all defendants.

2) **Reserved Objections.** All objections are reserved until trial or other use of the deposition, except those objections regarding the form of the question or the existence of a privilege. Objecting counsel shall say simply the words “objection” and no more, to preserve all objections as to form. Only if one of the examining counsel request clarification shall the basis of the objection be stated, and then only the short title of the rule (e.g., “lack of foundation” or “calls for speculation”) shall be stated by objecting counsel.

3) **Directions Not to Answer.** Counsel shall not direct or request that a witness refuse to answer a question, unless that counsel has objected to the question on the ground that the question seeks privileged information, information that the Court has ordered may not be discovered, or a deponent seeks to present a motion to the Court for termination of the deposition on the grounds that it is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or harass the party or the deponent.

E. **Objections to Documents.** All objections to the admissibility of any documents used during the course of a deposition are deemed reserved until the time of trial or use in any dispositive motion. No objections to the use of any document are necessary or shall be noted on the record.

F. **Claim of Privilege.** When a privilege is claimed, the witness should nevertheless answer

CASE NO. 09-2051-MD-ALTONAGA

questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

G. **Private Consultations.** Private consultations between deponents and their attorneys during the course of examination while a question is pending are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments.

H. **Disputes During Depositions.** Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to the Court by telephone by calling the Court's Chambers. In the event the Judge is not available, the deposition shall continue as to matters not in dispute with full reservation of rights to continue the examination objected to pending a ruling at the earliest possible time. If the nature of the dispute would not require the continuance of the deposition pending resolution thereof, the parties may elect to either present the matter to the Court by telephone at a time when the parties and the Court are available, or to present the dispute to the Court in writing. If the parties elect to present the dispute to the Court in writing, each side must submit on no more than two (2) pages a summary of its position and any authority relevant to the dispute. The Court will issue a prompt ruling, as its schedule permits. Nothing contained herein shall prohibit examining counsel from continuing with the deposition, filing an appropriate motion with the Court at the conclusion of thereof, and appearing personally before the Court if argument is permitted by

CASE NO. 09-2051-MD-ALTONAGA

the Court and counsel deems it necessary. Disputes between the parties should be addressed to this Court rather than to the District Court in which the deposition is being conducted.

I. **Copies of Exhibits.** A copy of any document about which examining counsel expect to question the deponent should be provided to primary counsel for the parties and the deponent at the time presented to the deponent and his/her counsel.

J. **Marking of Deposition Exhibits.** Documents not previously marked as exhibits shall be marked with a sequential number as "Plaintiff's Exhibit \_\_," Defendant's Exhibit \_\_," or (Witness Name) Exhibit \_\_." The same exhibit presented as an exhibit at subsequent depositions shall continue to be referred to as originally marked, and counsel should avoid marking the same document with a different exhibit number at any subsequent deposition. The first time a document is marked as a deposition exhibit, it shall be referred to by the Bates number appearing on the document. Documents that have not been previously produced shall be assigned a Bates number from a range of numbers reserved for this purpose. Thereafter, the exhibit shall be referred to by its deposition exhibit number, and plaintiffs' deposition exhibits and defendants' deposition exhibits shall each be numbered sequentially running from deposition to deposition. In the alternative, prior to commencement of the first deposition, the parties may agree that deposition exhibits shall be numbered by specific Witness, for example "Smith Exhibit \_\_," and Witness exhibits with the same Bates Number will be tracked by the Bates Number.

K. **Depositions Pursuant to Rule 30(b)(6).** In those instances when the Plaintiffs serve a deposition notice pursuant to Federal Rule Civil Procedure 30(b)(6), the following shall apply (in addition to the foregoing general procedures governing depositions):

- 1) **Subject Matter.** Pursuant to Rule (30)(b)(6), the party wishing to take the deposition

CASE NO. 09-2051-MD-ALTONAGA

will in good faith describe with reasonable particularity the matters on which the party is requesting examination. Within a reasonable period of time after receiving the notice, the party to be deposed will in good faith attempt to inform the discovering party if it believes that multiple witnesses will be necessary to respond to the requested categories of information and to which category each witness will be produced to respond.

L. **Stenographic Recording.** The parties shall confer regarding a mutually agreeable national court reporting service to provide certified court reporters who shall stenographically record all deposition proceedings and testimony. The court reporter shall administer the oath or affirmation to the deponent. A written transcript by the court reporter, together with copies of all exhibits marked or referred to during the deposition, shall constitute the official record of the deposition for purposes of Federal Rule Civil Procedure 30(e) (submission to the witness) and 30(f) (filing, exhibits). The transcript shall also contain the name of any attorney and any other person attending the deposition together with the name of his or her firm or organization, business address and, if applicable, the name of the person or organization he or she represents. The court reporter shall be requested to furnish the transcript in electronic form and hard copy in Min-U-Script format to the representative of plaintiffs conducting the deposition and a designated representative of defendant attending or defending the deposition.

M. **Videotaped Depositions.** By so indicating in its notice of a deposition, a party may record a deposition by videotape pursuant to Fed. R. Civ. P. 30(b)(2) and (3) subject to rules:

1) All videotaped depositions shall be simultaneously stenographically recorded with “real-time feed” transcription capabilities.

2) The party requesting videotaping of the deposition shall bear the expense of both the

CASE NO. 09-2051-MD-ALTONAGA

videotaping and the stenographic recording. Requests for the taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

3) The operator(s) of the videotape recording equipment shall be subject to the provisions of Federal Rule Civil Procedure 28(c). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

4) At the commencement of the deposition, each witness, attorney and any other person attending the deposition shall identify themselves on camera. The deponent (and demonstrative materials or exhibits used during the deposition) will be videotaped. One camera shall be employed to videotape the testimony of the witness at the deposition. No attorney or party shall direct instructions to the video operator as to the method of operating the equipment. The video camera operation will be suspended during the deposition only upon stipulation by counsel and "off the record" discussions. The video operator shall record on camera the time of suspension and any subsequent reconvening of the deposition.

5) The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at trial. Unless physically incapacitated, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent.

CASE NO. 09-2051-MD-ALTONAGA

6) After the deposition is completed, the video operator shall certify on camera the correctness, completeness, and accuracy of the videotape recording in the same manner as a stenographic Court reporter, and preserve custody of the original videotape in its original condition until further order of the Court.

7) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

N. **Telephonic Depositions.** By indicating in its notice of deposition that it wishes to conduct the deposition by telephone, a party shall be deemed to have moved for such an order under Federal Rule Civil Procedure 30(b)(7). Unless an objection is filed and served within ten calendar days after such notice is received, the court shall be deemed to have granted the motion. Other parties may examine the deponent telephonically or in person. However, all persons present with the deponent shall be identified in the deposition and shall not by word, sign, or otherwise coach or suggest answers to the deponent.

O. **Supplemental Depositions.** Each party who did not have reasonable notice of a fact deposition and who was not present or represented at the deposition (including parties later added and parties in cases subsequently filed in, removed to, or transferred to this Court) may, within thirty (30) days after filing of the deposition (or, if later, within sixty (60) days after becoming a party in any action which is transferred to this Court), file a motion to conduct a supplemental deposition of the deponent. Each party who wishes to take a supplemental deposition must certify that their attorney has read the prior deposition, and state specifically the areas of inquiry not previously addressed and sought to be pursued in the deposition sought. Within fifteen (15) days of the filing of any such motion, any party may file an opposition to the motion and seek a protective order

CASE NO. 09-2051-MD-ALTONAGA

prohibiting the supplemental deposition on the grounds that the MDL 2051 deposition fully covered the area or areas sought to be explored in the supplemental deposition, that the testimony is not relevant, or any other reason thought valid.

1) No further deposition by any party having received notice of the original deposition will be permitted, except upon order of this Court on good cause shown or pursuant to agreement of the parties.

2) If a supplemental deposition is permitted by the Court or is unopposed, it shall be treated as the resumption of the deposition originally noticed. During the resumed deposition, the prohibitions regarding redundant or repetitive examination contained herein are fully applicable, unless otherwise agreed by the parties or ordered by the Court. The resumed deposition shall be taken at the same location as the initial deposition unless otherwise agreed to by the parties and the deponent or ordered by the Court.


**P. Copies of Transcripts and Videotapes.** Subject to any restrictions contained within the Stipulated Confidentiality Order, any party may at its own expense obtain a copy of the videotape and the stenographic transcript by contacting counsel noticing the deposition or the court reporter.

**Q. Correction and Signing Depositions.** Unless waived by the deponent, the transcript of a deposition, or any portion thereof, shall be submitted to the deponent for correction and signature within thirty (30) days after receipt of the deposition transcript or any portion thereof, unless the Court allows a supplemental deposition pursuant to this Order. If a supplemental deposition is allowed, the transcript thereof shall be submitted to the deponent as soon as it is available for distribution. A deposition transcript, or a transcript of a portion thereof, may be signed by the deponent before any notary within forty-five (45) days after the transcript, or any portion thereof,

CASE NO. 09-2051-MD-ALTONAGA

is submitted to the deponent. If no corrections are made during this time, the transcript will be presumed accurate. Any confidential designations of all or any portion of a deposition or any supplemental deposition shall be made pursuant to Section 8 of Case Management Order No. 2 (Protective Order).

**DONE AND ORDERED** in Chambers at Miami, Florida, this 22nd day of October, 2009.

  
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**CECILIA M. ALTONAGA**  
**UNITED STATES DISTRICT JUDGE**

cc: counsel of record